

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
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Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996:)
Dialing Parity/Number Administration/)
Notice of Technical Changes/Access to)
Rights of Way)
)

CC Docket No. 96-98

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

**SECOND INITIAL COMMENTS
OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.**

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Time Warner Communications Holdings, Inc.
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May 20, 1996

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SUMMARY

Time Warner Communications Holdings, Inc. ("TW Comm") provides local exchange and exchange access service in Rochester, New York, and New York City and will soon provide such service in Ohio and Texas. It has begun negotiations to provide service in a variety of other states. TW Comm is committed to becoming a state-of-the-art facilities-based local telecommunications service provider in competition with incumbent local exchange carriers ("ILECs") and other service providers. TW Comm believes that the issues addressed in this separate set of comments, like the issues addressed in the comments submitted by TW Comm on May 16, 1996 in this same proceeding, are critically important to its ability to become an effective facilities-based local telecommunications service provider. To that end, these comments address the Commission's proposed rules to implement those provisions of the Telecommunications Act of 1996 ("1996 Act") regarding: (i) an ILEC's duty to notify the public of technical changes to its network; (ii) a LEC's duty to afford access to rights-of-way; and (iii) Numbering Administration.

Keeping in mind the three overriding public policy objectives articulated in detail by TW Comm in its May 16, 1996 comments, *i.e.* competition in all levels of telecommunications, services, including local service, is national policy requiring the Commission establishment of nationally uniform rules; Congress intended separate, competing facilities-based networks which require the promulgation of Commission rules to create incentives for facilities-based competition; and, Commission rules must include procedures and penalties to deal with ILEC

attempts to impede or forestall local competition, TW Comm submits the following:

The Section 251(c)(5) ILEC affirmative duty to notify the public of technical changes:

- Must be broadly interpreted to accomplish the competitive objectives of this proceeding;
- Arises whenever an ILEC commits to modify or add to a network facility, service or feature that affects or relies on interconnection or interoperability with another provider's network;
- Is analogous to the Commission's enhanced services and CPE-related Network Disclosure Rules;
- Requires disclosure to the public at the earliest known date, *i.e.* "make/buy point," and prohibits advance disclosure to any entity;
- Requires that disclosure be accomplished in a uniform format and forwarded to the Commission for public release through the Commission's daily releases; and
- Includes the provision of complete technical information in a timely manner without extracting costly fees for obtaining that information.

The Section 251(b)(4) duty of a LEC to afford access to rights-of-way must be consistent with the provisions of Section 224 as amended by the 1996 Act, which includes:

- Equal access to all telecommunications service providers on a first-come first-served basis;
- An exception to mandatory access for electric utilities based on real capacity limitations only, with the burden falling on the utility to demonstrate a factual basis for denial;
- An exception to mandatory access based on safety, reliability or engineering reasons which relies on the National Electrical Safety Code ("NESC") as the basis for denial;
- Notice of modification or alteration by an owner of a right-of-way, in writing to any "attaching" entities at least 90 days before work is to commence; and
- Calculation of "proportionate share" of owner's cost to modify or alter based on

the "but for" test, with no share of cost attributable to attaching entities if no increase in cost is directly attributable to them.

Section 251(e)(1) authorizes the Commission to exercise primacy in the regulation of the North American Numbering Plan and to delegate certain number administration responsibilities to the States. In this regard TW Comm submits:

- Implementation of new area codes should be delegated to the States in conformity with Commission-established guidelines;
- Number-administration guidelines must ensure that neither states nor ILECs retain the ability to implement number assignments which disadvantage competitors;
- Commission should follow policies articulated in 1995 Ameritech decision which held that area code overlay plans which require new entrants to use different area codes than incumbents violate Section 202(a) and 201(b) of the Act;
- National number administration policies must efficiently and timely accommodate new services and providers by making numbering resources available in a manner which does not favor any industry segment.

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To: The Commission

**SECOND INITIAL COMMENTS
OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.**

Time Warner Communications Holdings, Inc. ("TW Comm"),¹ by its attorneys, hereby submits its second set of initial comments on the Commission's notice of proposed rulemaking in the above-captioned proceeding².

¹TW Comm is a wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

²Pursuant to the directives of the Notice, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, FCC 96-182, released April 19, 1996 (hereinafter "Notice"), TW Comm submitted its first set of initial comments ("Initial Comments") in this proceeding on May 16, 1996 in accordance with the procedures set forth by the Commission in the Notice. TW Comm's comments herein address the subset of issues identified by the Commission in the Notice for a separate comment date of May 20, 1996.

INTRODUCTION

TW Comm is a provider of local telecommunications services in communities throughout the United States. It provides service in Rochester, New York, and New York City, is soon to initiate service in Ohio and Texas, and has begun negotiations in Florida, Tennessee, North Carolina, California and Indiana. TW Comm's services include local exchange telecommunications service, as well as exchange access service. The TW Comm business plan contemplates that it will provide these and other services utilizing its own telecommunications network facilities. TW Comm is committed to making the significant investments necessary to construct and operate state-of-the-art local telecommunications networks. In short, TW Comm will be a facilities-based provider of local telecommunications services, in competition with incumbent local exchange carriers (ILECs) as well as other service providers.

In these comments, TW Comm will address the issues of "Notice of Technical Changes," "Access to Rights-of-Way," and "Number Administration" raised by the Commission ("Commission") at paragraphs 189, 220 and 250, respectively, of the Notice. In developing its position on these issues, TW Comm has been guided by the three principle public policy objectives which it offered for the Commission's consideration in its Initial Comments.³

First, competition in all levels of telecommunications services, including local service, is a National policy requiring the Commission establishment of nationally, uniform rules. Second, Congress intended that meaningful local competition occur through separate and competing network facilities which require the Commission to promulgate rules to create incentives for

³See TW Comm Initial Comments, pp. 2-5.

facilities-based competition. Third, the Commission rules implementing the provisions of the 1996 Act must impede or forestall entry of local competition.

I. Duty to Provide Public Notice of Technical Changes

Section 251(c)(5) of the Telecommunications Act of 1996 ("1996 Act")⁴ imposes upon ILECs an affirmative duty to inform the public of "changes in information necessary for the transmission and routing of services using local exchange carriers ("LEC") facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks." This "Public Notice of Changes" provision is yet another of the key local telecommunications competition requirements imposed upon ILECs by Section 251(c) of the 1996 Act. In proposing to adopt rules to implement this requirement, the Commission, at paragraph 189, undertakes first to define the key phrases contained in this disclosure provision prior to proposing specific disclosure requirements and procedures. To that end, the Commission has suggested a broad interpretation of Section 251(c)(5) designed to encompass *any and all* technical information which would affect the interconnection or interoperability of ILEC networks with other telecommunications service providers' networks or facilities in accordance with Section 251(c)(2). This broad-based definition proposed by the Commission is critical to ensuring that ILECs fulfill all of the obligations imposed upon them by Section 251(c) of the 1996 Act.⁵ ILECs must not be permitted to retain the ability to deter effective competition

⁴Pub. L. No. 104-104, 110 Stat. 56.

⁵A broad-based interpretation of the scope of technical network information subject to the Public Notice of Changes disclosure requirement of Section 251(c)(5) is consistent with the Commission's network disclosure requirements associated with changes to telephone company

through adoption of technical changes to their networks which affect interconnection and interoperability, but which are not subject to the Public Notice of Change disclosure requirements due to a narrow interpretation of 251(c)(5). Consistent with the Commission's tentative conclusions in the Notice, and in keeping with the letter and spirit of the 1996 Act, TW Comm submits that the Public Notice of Changes requirement of 251(c)(5) must be triggered whenever any ILEC undertaking involves a modification to an existing ILEC network facility, service or feature, or the introduction of a new network facility, service or feature that would affect or rely on the interconnection or interoperability of that ILEC's network with another service provider's network or facility. This Public Notice of Changes requirement is analogous to the Network Disclosure Rules associated with intercarrier interconnection for the provision of enhanced or information services and customer premises equipment ("CPE") codified at Sections 64.702(d)(2) and 68.110(b) of the Commission's rules, 47 CFR §64.702(d)(2) and 68.110(b).⁶ If properly implemented, the requirement will ensure that all competing service providers have access to the same information regarding the technical design, configuration and

networks effecting the interconnection of enhanced services and customers premises equipment ("Network Disclosure Rules"). See e.g., In the Matter of Computer and Business Equipment Manufacturers Association, 93 FCC 2d 1226, 1228 (1983) (hereinafter "CBEMA Order") where the Commission rejected a narrow interpretation of the network disclosure information requirements relating to network design and technical standards contained in Section 64.702(d)(2) and Section 68.110(b) of its rules, 47 CFR §64.702(d)(2) and §68.110(b).

⁶These Network Disclosure Rules were first adopted in Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), *reconsideration* 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd. sub nom. CCIA v. FCC*, 693, F.2d 198 (D.C. Cir. 1982) *cert denied*, 461 U.S. 938 (1983) (hereinafter "*Computer II*").

operation of an ILEC's local exchange network, on the same basis, in so far as that information affects or relies on interconnection and interoperability with a competitor's network or facilities.

Just as the Network Disclosure Rules are intended as safeguards to prevent preferred or affiliated competing enhanced service providers or CPE providers or manufacturers from obtaining information from a Bell Operating Company ("BOC") or AT&T that would give that preferred or affiliated provider a competitive advantage over other competing enhanced service or CPE providers, rules implementing the Public Notice of Changes requirement of Section 251(c)(5) must also safeguard against unfair competitive advantage which could be gained by an ILEC or an entity preferred by or affiliated with an ILEC through advance access to information about an ILEC's network that would afford such entities competitive advantages. To achieve this end, disclosure of the technical changes, at a minimum, must be made publicly available at the earliest practical time and must include information sufficiently broad in scope, yet defined in detail, to notify interested or affected parties of the ILEC's planned changes or additions to its network to ensure compatible network interconnection and/or interoperability. Finally, disclosure must be accomplished through a method whereby interested parties have ready access, and must clearly state the means for obtaining full disclosure of the finer details of technical changes if a competitive service provider deems this further information to be necessary.

A. **Timing of Disclosure of Technical Changes**
Information Must Occur at Earliest Known Point

Consistent with the express language of the 1996 Act, the Commission has tentatively concluded that timing of public disclosure be within a "reasonable" time in advance of planned implementation and seeks comment on what constitutes "reasonable."⁷ The Notice cites to the Network Disclosure Rules timetable adopted the *Computer III* proceeding⁸ and inquires whether a comparable timetable would be appropriate with respect to Section 251(c)(5) disclosure. The timetable for disseminating the network disclosure information required by *Computer II* and *Computer III*, and the audience to which it must be released, varies depending on the particular circumstances associated with an event invoking the obligations of the Network Disclosure Rules. The earliest disclosure point is when a BOC decides to develop or procure a new or modified network feature (*i.e.*, the "make/buy" point) affecting or relying on network interface

⁷Notice at ¶ 192.

⁸Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), (*Phase I Order and Phase I Recon., Order vacated*, California v. FCC 905 F.2d 1217 (9th Cir. 1990) (California I); *Phase II*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order*, vacated, California I, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied*, California V. FCC 4 F.3d 1505 (9th Cir. 1993) (California II); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*); *BOC Safeguards Order, vacated in part and remanded. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995) (hereinafter "*Computer III*").

(or when it communicates this intent to another entity involved in enhanced services or CPE), and the latest disclosure point being six months prior to the implementation of a modified or new network feature.

Unlike these Network Disclosure Rules, however, the Public Notice of Changes provision is a statutorily-imposed obligation created by Congress as one of the tools to enhance the development of competitive telecommunications markets, particularly local exchange telephone markets, through requiring ILECs to disclose information necessary for effective interconnection and interoperability with competitive providers. Congress's goals will only be accomplished if ILECs disclose such information to the public at the earliest available date, *i.e.*, the date by which they affirmatively decide to implement a new or modified network feature affecting interconnection or interoperability with a competing provider, regardless of the projected date of implementation. This differs somewhat from the Network Disclosure Rules which require disclosure at this point *only* to the CPE and enhanced services industry, with general notice to the public 12 months prior to introducing the change.

Under the terms of the 1996 Act, if effective facilities-based competition is to occur, then competing services providers must have as much advance notice as possible of planned changes to ILEC networks in order to effectively and efficiently plan for their provision of competing service through interconnection with those networks. Notice to the general public at the earliest point in time will aid in accomplishing this goal. Moreover, like the Network Disclosure Rules, the Public Notice of Changes rule must embody a minimum period of time between disclosure of the technical changes and an ILEC's implementation of the change within, or to, its network.

While six months is the shortest period which the Commission should consider, it may be necessary to lengthen this timeframe if the record supports that competing service providers require additional time to factor ILEC technical network changes into their own network design or operations. Lastly, disclosure of this information to any potential competing services provider should be prohibited, until public disclosure has first been made.

B. Disclosure Must Provide Sufficient Information Regarding the Technical Changes Being Implemented

TW Comm agrees with the Commission's proposed minimum disclosure requirements as set forth in paragraph 190 of the Notice with one addition addressed below. The disclosure should be detailed enough to provide the public with sufficient information to determine whether it will be impacted by, or otherwise interested in, the ILEC's technical network change, so as to require further detailed information. The initial disclosure notice need not be tantamount to a technical specifications document. The adoption of an additional requirement that the disclosure notice provide information as to how the interested party can obtain more detailed technical information *i.e.*, that information which generally is available in technical specification documents regarding the proposed technical changes, and include a number and point of contact at the ILEC for obtaining this information, will ensure that the degree of technical information regarding an ILEC's network necessary to satisfy the requirements of Section 251(c)(5) will be available to those carriers who require it without the need to include all of it in the disclosure to the general public.

C. Public Notice of Changes Must Occur Through A Uniform Means of Dissemination

The Network Disclosure Rules do not require that notice and disclosure be provided in any uniform or prescribed manner. Instead, notice or disclosure may be provided in any manner that "effectively and efficiently" communicates the information to those entities that would be reasonably interested⁹ through any "reasonable means"¹⁰. As a result, dissemination of this information occurs in numerous ways, including through publication in Technical Journals, press releases, or even advance tariff filings. In short, any reasonable means of notification and disclosure may be, and often are, used. Consequently, in order for a CPE or enhanced service provider to determine how a particular BOC will comply with the Network Disclosure Rules, it must contact each BOC and AT&T on a continuing basis, possibly subscribing to numerous technical journals, to be assured of receiving adequate notice. Short of this cumbersome and somewhat unreliable procedure, it is possible that affected CPE or enhanced service providers may not actually receive notice. Since Section 251(c)(5) of the 1996 Act pertains to all ILECs, not only BOCs, and since its purpose contemplates actual notice of technical changes to the public, TW Comm believes the Commission must adopt a uniform Public Notice of Changes rule which prescribes a specific method by which notification and disclosure must be provided.

⁹See CBEMA Order at 1246; In the Matter of Customer Premises Equipment By the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143, 151 (1987) ("BOC CPE Relief Order").

¹⁰In the Matter of Furnishing Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, Order, 102, FCC 2d 655, pp. 53 (1985), BOC CPE Relief Order at 151, Computer III (Phase II Order) at ¶ 102-140.

Commission promulgation of nationally uniform notice and disclosure requirements and procedure would ensure that all affected competing telecommunications services providers have equal access to the information required to be disclosed under Section 251(c)(5). TW Comm suggests that the Commission adopt a disclosure requirement, similar to that initially imposed upon AT&T in 1983 with respect to CPE and enhanced services.¹¹ Through adopting a similar requirement to implement 251(c)(5), the Commission could require an ILEC to prepare and file a "Public Notice of Change Pursuant to §251(c)(5) of the Act" in accordance with the rules and policies adopted pursuant to this Notice, which the ILEC would forward to the Commission within a specified time frame for release by the Commission via its Public Notice or News Release process. The public, including competitive telecommunications service providers, would then be assured of receiving the requisite notice contemplated by Section 251(c)(5) through arranging to receive or have access to the Commission's daily releases, without the need to query each ILEC regarding its preferred or chosen method of disclosure.¹²

Notice by the ILEC through this method would be no more burdensome than notice by any other means, and in fact, may be less burdensome. Moreover, it would establish a central point of reference for access to all the technical change information required by Section 251(c)(5) of the 1996 Act. Failure to comply with the rules established by the Commission in

¹¹See CBEMA Order at 1246 where the Commission required AT&T to file a notice of disclosure with the Commission within seven days of a disclosure obligation arising. The Commission then made this notice available for public inspection.

¹²Continuation of the Commission's current practice of posting such notices on the Internet will further ensure meaningful availability to interested persons, including telecommunications carriers, of the requisite network change notification.

implementing Section 251(c)(5), including this mandated method of notice, would be enforced through the Commission's Section 208 complaint process.¹³

Finally, while not specifically raised by the Commission in this instant Notice, TW Comm notes that the Commission currently does not regulate, other than pursuant to the general "reasonable" standard, whether or to what extent the BOCs or AT&T can charge enhanced service providers or CPE manufacturers for the more detailed technical information contained in technical specifications documents or similar technical journals referenced in their Network Disclosure releases. TW Comm believes that the Commission must be cognizant of the fact that ILECs may attempt to extract exorbitant charges for the full technical information summarized in their "Public Notice of Change Pursuant to Section 251(c)(5)" of the Act and, to the extent this occurs, find such charges to be in contravention of the "reasonable" provision of Section 251(c)(5).

Similarly, when a competitive telecommunications service provider requests the more detailed technical information regarding its network change directly from the ILEC, the Commission must ensure that this request is promptly met. Because this technical information should be available from the ILEC upon forwarding its "Public Notice of Change Pursuant to Section 251(c)(5)" to the Commission, for release, then the technical information should be available and forwarded to the requesting service provider by the ILEC within ten business days after receipt of the request.

¹³47 CFR §1.711 *et seq.*

II. Access to Rights-of-Way

Section 224 of the Communications Act of 1934, as amended, has, since its enactment in 1978, required LECs (and other utilities), if they provided access to poles, ducts, conduits, and rights-of-way to cable systems, to do so pursuant to just and reasonable rates, terms, and conditions.¹⁴ Such access, however, was not mandatory. As part of the interconnection requirements enacted in new Section 251 of the 1996 Act, a mandatory access to rights-of-way requirement for LECs was added.¹⁵ This requirement mandates access consistent with the provisions of Section 224,¹⁶ which was also amended by the 1996 Act. While the 1996 Act added and amended several provisions of Section 224, which, by reference, apply to a LEC in fulfilling its statutory duty to afford access, the instant Notice is limited only to the specific provisions of new Sections 224(f) and (h).

Accordingly, the Commission seeks comment first on the meaning of the term "nondiscriminatory access" as it is used in Section 224(f)(1) and then inquires as to the standards to be used for determining exceptions to the access requirement pursuant to Section 224(f)(2). Finally, the Commission seeks comment on the meaning of Section 224(h) with respect to modification and cost recovery by an owner of a pole, duct, conduit or right-of-way ("Facilities").

¹⁴47 U.S.C. § 224(b)(1).

¹⁵47 U.S.C. §251(b)(4).

¹⁶47 U.S.C. §224.

A. **Nondiscriminatory Access to
Rights-of-Way Means First-Come, First-Served**

TW Comm submits that the term "nondiscriminatory access" as used in Section 224(f)(1) must be interpreted to require a utility to afford access to its facilities to any and all cable systems and telecommunications carriers on a first-come, first-served basis so long as the entity seeking access agrees to comply with the utility's reasonable terms and conditions imposed pursuant to Section 224 and so long as the utility has the requisite space on its facility. Moreover, TW Comm believes that the rates, terms, and conditions for access to the Facilities must be virtually the same for all requesting entities, including the utility itself, when the proposed means of access is the same or similar regardless of the use for which the attachment is intended. To interpret this provision otherwise would open the door for a utility to impose more onerous or costly conditions on certain service providers resulting in competitive advantage to other providers in contravention of Congress's express intent in the 1996 Act.

B. **Denial of Access Based on Insufficient Capacity or Safety, Reliability
or Engineering Purposes Places the Burden on the Utility Denying Access
to Demonstrate the Factual Basis for Denial**

Section 224(f)(2) carves out exceptions to the mandatory access requirement for electric utilities when "there is insufficient capacity" or for safety, reliability and engineering reasons. The Commission seeks comment on the standards for determining when these exceptions are appropriately applied, asking what this language means and how to administer these provisions.

As to a determination of insufficient capacity, TW Comm submits that rarely should a

problem regarding a claim of insufficient capacity arise. Pursuant to current practice in the cable area, if an attachment to a pole is being sought, and a particular pole has insufficient space, the cable operator has the choice of not attaching to that pole or paying the utility to replace the existing pole with a larger one. Likewise, in the case of conduit space, capacity limitations are a function of the physical limitation of the conduit. Any utility claiming insufficient capacity should have to bear the burden of demonstrating the factual basis for this denial. Moreover, denial of access to one service provider based on insufficient capacity with a subsequent grant of access to another provider on the same facility at a later date should subject the utility to sanctions under the 1996 Act as a violation of Section 224(f).

As for the safety, reliability and engineering exemptions to affording access, TW Comm submits that the Commission should rely on the National Electrical Safety Code ("NESC"),¹⁷ or a locally adopted version thereof, as the basis for standards in this area. Some electric companies have been known to deny access based on their own internal review of safety requirements. Neither the Commission nor a service provider seeking access to Facilities should be placed in the position of having to determine whether these requirements are reasonable. Moreover, the Commission need not adopt its own set of standards. Instead, the Commission should announce its reliance on the nationally-recognized standards in this area embodied in the NESC. Cable companies and utilities have co-existed on this basis for many years without encountering major problems.

¹⁷National Electrical Safety Code (1993), The Institute of Electrical and Electronics Engineers, Inc.

Similar to a claim of insufficient capacity, a utility denying access based on safety, reliability or engineering, must be required to state the basis for its denial, cite to the applicable section of the NESC, and bear the burden of demonstrating that an exemption to affording access exists.

**C. Notification Regarding Modification or Alteration
Must Be in Writing 90 Days Before Work Commences**

New Section 224(h) of the 1996 Act requires the owner of a pole, duct, or conduit to notify entities who are attached thereto when it intends to "modify or alter" the Facility. Such notice is intended to give those entities a "reasonable" opportunity to "add to or modify" their existing attachments. If they avail themselves of this opportunity, the Act provides that they must pay their "proportionate share" of the owner's costs. In order to effectively implement this provision, the Commission inquires as to the manner and timing of the notice which the Facilities' owner must give to an attaching entity. TW Comm recommends that in accordance with the express language of the 1996 Act, such notice must be in writing; that it be given at least 90 days before the work is scheduled to commence; and that it be provided directly to the individuals at the attaching entity whose responsibilities include such matters. TW Comm submits that a minimum 90-day period is needed to perform necessary engineering analyses as well as to arrange for new equipment and construction if required.

**D. Determination of "Proportionate Share"
Must Be Based on a "But for" Test**

The Commission seeks comment regarding the determination of a "proportionate share" of the owner's costs of altering or modifying a pole, duct, conduit or right-of-way if an attaching entity makes an addition or modification to its attachment. TW Comm believes that the answer lies in a simple application of the "but for" test. If the attaching entity's addition or modification does not increase the Facility owner's cost of modification or alteration beyond that which it would have incurred if the attaching entity had made no corresponding modification or addition, then the attaching entity should pay no portion of the owner's cost of the construction. (If, as a result of a modification, however, the attaching entity "leases" more of the available space than before, *i.e.*, by securing an additional attachment, then additional lease payments would be justified.) On the other hand, if the attaching entity's addition or modification increases the owner's cost, then the attaching entity's "proportionate share" should appear to be the incremental cost to the owner beyond what it would have cost absent the increase due to the attaching entity.

As to the issue of whether the payment of a proportionate share of the owner's costs should be offset by the potentially greater revenues the owner will receive from its improved Facilities, *i.e.*, through higher lease payments, TW Comm notes that this issue is directly related to the long-standing issue of attaching entities being required to pay rental on facilities for which they have paid some or all of the capital costs. In the case where an increase in an owner's cost is directly attributable to an attaching entity, and the attaching entity pays the entire incremental

cost, some adjustment or offset mechanism would be appropriate and equitable if the owner subsequently increased that attached entity's lease payment to recover the same cost. TW Comm submits this approach would be consistent with new Section 224(i), a provision which, while not the subject of comment in this particular Notice, evidences Congressional intent that attaching entities not be required to bear costs associated with modifications resulting from another's desired modification. It would follow, by analogy, that Congress would not intend attaching entities to twice bear the costs of modifications, once through an initial cost and then through an increase in rental charge.

E. **Limitations on an Owner's Rights to Modify
Not Inherent in Section 224(i) Must Include
a Prohibition Against Decreasing Accessibility**

Finally, the Commission asks whether it should adopt any limits on a Facility owner's right to modify a Facility and then collect a proportionate share of the costs. As explained above, if the attaching entities are not required to pay a share of the modification because the cost is not directly attributable to them, then the owner should be free to modify the Facility as it desires. Section 224(i) protects attaching parties from bearing any of the costs of rearrangements or replacements required as a result of additions or modifications sought by others, including the owner. If, however, a facility owner sought to make a modification which would decrease accessibility to the Facility by attaching entities, TW Comm believes such modifications, unless appropriately justified, must be prohibited.

III. Number Administration

At paragraphs 250 through 259 of the Notice, the Commission addresses the general provisions of Section 251(e) of the 1996 Act with respect to numbering administration. Section 251(e)(1) of the Act provides, in relevant part, as follows:

. . . The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.¹⁸

While the Act clearly authorizes the Commission to exercise primacy in the regulation of the North American Numbering Plan, it also recognizes that certain aspects of numbering administration may be more appropriately performed at the state level. The Act therefore authorizes the Commission to delegate number administration responsibilities to the states. Armed with both the statutory authority to regulate numbering administration and to delegate that authority, the Commission seeks comment on how and under what circumstances that authority should be exercised.

TW Comm concurs with the tentative conclusion (Notice at ¶256) that the Commission should delegate implementation of new area codes to state commissions, provided that such state implementation be accomplished in conformity with the Commission's numbering plan guidelines. Establishment of general numbering administration guidelines to be followed by the states remains subject to the authority of the Commission. Those guidelines must, of course, be consistent with, and in furtherance of, the policy objectives of the 1996 Act. The paramount

¹⁸47 U.S.C. §251(e)(1).

objective of the 1996 Act is promotion of competition in all telecommunications markets -- intrastate and interstate. Therefore, to the extent that numbering administration may impact the development of competitive markets, the Commission's guidelines should ensure that neither states nor ILECs retain the ability to implement number assignments in a manner which disadvantages competitors or which discourages competitive markets.

In this regard, the policies articulated by the Commission in its 1995 Ameritech decision on numbering administration should be followed.¹⁹ In that proceeding, the Commission concluded that an area code overlay plan proposed by Ameritech which would have required new entrants, specifically wireless service providers, to utilize a new area code while allowing the wireline provider (*i.e.* the ILEC) to enable its customers to enjoy the convenience of continued use of the current area code constituted an unreasonable discrimination in violation of Section 202(a) of the Act as well as an unjust and unreasonable practice in violation of Section 201(b) of the Act. In reaching these conclusions, the Commission noted that Ameritech's proposed area code overlay plan would place disproportionate burdens on some carriers, but not others, that area codes are essential resources which should be shared as fairly and equitably as possible, and that successful numbering administration should accommodate new services and providers by making numbering resources available in a manner which does not favor any industry segment and which makes numbers available on an efficient, timely basis.²⁰

¹⁹Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois (Declaratory Ruling and Order), 10 FCC Rcd 4596 (1995) ("Ameritech 708 Proceeding").

²⁰*Id.* at 4608.